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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MANUEL MONTENEGRO,

Defendant and Appellant.

F054015

(Super. Ct. No. VCF170005B)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Brian Alvarez, William Kim, and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Vartabedian, Acting P.J., Levy, J., and Kane, J.

On September 2, 2006, at approximately 8:00 p.m., in Tulare, Rose Rodriguez was in a car driven by Alejandro Govea when she noticed they were being followed by a dark car. Rodriguez told Govea to stop at a friend's house and she drove from there. While Rodriguez's car was stopped, the other car turned around. As Rodriguez drove away, the car got behind them again. Rodriguez turned into an alley and someone from the other car started shooting at Rodriguez and Govea. One shot hit Govea in the skull but did not penetrate it.

Tulare Police Officer Priscilla Solis was on patrol when she heard shots and saw a small dark colored car pass in front of her. Solis pulled in behind the car and attempted to stop it after seeing it alternate between speeding up and slowing down. The car stopped and three Hispanic males got out and ran away. Solis found a loaded SKS assault rifle in the trunk. The car was registered to Jose Ochoa.

On September 3, 2006, Ochoa reported his car stolen. On September 5, 2006, he went to the police station to pick up his car and was arrested. During a police interview, Ochoa initially denied knowing anything about the shooting but he eventually admitted driving the car and identified Montenegro as the shooter. Ochoa also stated that Montenegro fired at the other car in response to its occupants shooting at them.

Ochoa took Tulare Police Sergeant Brian Haney to where Montenegro and Luis Montiel were living. Haney served a search warrant at the residence and arrested Montenegro and Montiel. The officers who searched the residence found numerous pictures of Montenegro "throwing" gang signs. During a police interview, Montiel stated that during the shooting he was in the backseat, Ochoa was the driver, and Montenegro was in the front passenger's seat. He also told the officers that he placed the assault rifle in the trunk through a hole in the divider between the backseat and the trunk area.

On December 15, 2006, the district attorney's office filed an information charging Montenegro with one count each of discharging a firearm from a motor vehicle (§ 12034,

subd. (c)/count 3) and shooting at an occupied motor vehicle (§ 246/count 4) and two counts each of attempted murder (Pen. Code,<sup>1</sup> §§ 664/187. subd. (a)/counts 1 & 2) and assault with a semiautomatic firearm (§ 245, subd. (b)/counts 5 & 6). Counts 1 and 2 also charged Montenegro with two firearm enhancements (§§ 12022.53, subd. (c) and 12022.53, subd. (b)) and a gang enhancement (§ 186.22, subd. (b)(1)(C)), counts 3 and 4 with a firearm use enhancement (§ 12022.5, subd. (a)(1)) and a street gang enhancement (§ 186.22, subd. (b)(1)(B)), and counts 5 and 6 with a firearm use enhancement (§12022.5, subd. (a)(1)) and a gang enhancement (§ 186.22, subd. (b)(1)(B)).

On June 26, 2007, Montenegro pled no contest to the two attempted murder counts, and admitted an arming enhancement (§ 12022.53, subd. (c)) and a gang enhancement in count 1 (§ 186.22, subd. (b)(1)(C)) in exchange for the dismissal of the remaining counts and enhancements. Montenegro was also promised a stipulated term of 39 years 4 months as follows: the middle term of 7 years on one attempted murder count, a consecutive term of 2 years 4 months on the second attempted murder count, a 20-year arming enhancement, and a 10-year gang enhancement.

On August 9, 2007, after defense counsel told the court that Montenegro wanted to withdraw his plea, the court conducted a hearing in chambers in the absence of the prosecutor. During the hearing, Montenegro complained that he wanted to withdraw his plea because when he entered it he did not know he could fight his case and he wanted to try to retain counsel to represent him. After some discussion the court continued the hearing to allow Montenegro to retain counsel.

On September 11, 2007, the hearing continued again without the prosecutor being present. Montenegro told the court he had been unable to retain counsel but still wanted to withdraw his plea. After the court asked him why, Montenegro made some

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

preliminary comments before stating he had “problems with his head” as a result of a gunshot wound to the head and sometimes did not “think properly.”

The court asked defense counsel whether Montenegro seemed coherent when he entered his plea. Defense counsel replied that when he met with Montenegro the day before Montenegro entered his plea, Montenegro told him he did not want to risk a trial at that time. The following day, defense counsel spoke with Montenegro to confirm their previous conversation and, since it was consistent, Montenegro entered his plea. According to defense counsel, Montenegro seemed lucid and able to understand.

The court stated it had reviewed the change of plea transcript and pointed out that when it asked Montenegro whether he was taking any medication or feeling ill in a manner that affected his ability to think clearly, he responded, “No.” Montenegro replied that he responded “yes” to everything that day because his mind was working slowly. The court asked Montenegro whether there was anything else he wanted to say and Montenegro replied that he was taking medication, he had problems with his mind, he had blood in his skull, and he had trouble sleeping at night. The court found there was no good cause to allow Montenegro to withdraw his plea and denied the motion. The hearing was then convened in open court with the prosecutor present and the court sentenced Montenegro to the stipulated term of 39 years 4 months.

Montenegro’s appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Although in a letter filed on August 4, 2008, Montenegro states he wants to “fight” the two enhancements, he does not raise any issues with respect to them. Following independent review of the record, on November 20, 2008, this court sent a letter to the parties asking them to brief whether the court erred in allowing Montenegro to present his motion to withdraw his plea in propria persona (cf.

*People v. Brown* (1986) 179 Cal.App.3d 207, 214) and if so, what, if any, is the appropriate remedy.

Respondent contends the change of plea hearing transcripts and defense counsel statements show that Montenegro did not have a legitimate basis for withdrawing his plea. Therefore, according to respondent, the court did not err by allowing Montenegro to present his motion in propria persona. Alternatively, respondent contends that any error in allowing Montenegro to present his motion in propria persona was harmless beyond a reasonable doubt because the record shows Montenegro did not have a legitimate basis for filing a motion to withdraw his plea. Montenegro contends defense counsel provided ineffective representation because he disclosed the contents of privileged communications with him and advocated against the granting of Montenegro's motion. Montenegro further contends that this court should direct the trial court to appoint conflict counsel because defense counsel's conduct caused a conflict to arise between defense counsel and Montenegro. We will reverse and remand the matter to the trial court for further proceedings.

In *People v. Brown, supra*, 179 Cal.App.3d 207, at the defendant's sentencing hearing, defense counsel advised the court that the defendant wished to withdraw his plea but that defense counsel was not making the motion for him because she did not believe there was a legal basis for such a motion. The defendant told the court that he was not in the right frame of mind when he entered his plea and asked the court if he could get another lawyer to represent him. The court found there was no hiatus in representation and denied the motion. (*Id.* at pp. 211-212.)

On appeal, the *Brown* court found the court erred in allowing the defendant to present his motion to withdraw his plea in propria persona while he was still being represented by counsel and stated:

“It was improper to permit defendant to bring his motion in propria persona while he was still represented by counsel and he had not waived his right to counsel. [Citation.] Defendant’s counsel doubtless believed it was not in defendant’s interest to withdraw his plea. Although, as previously stated, an attorney representing a criminal defendant has the power to control the court proceedings [citations], that power may not be exercised to deprive a defendant of certain fundamental rights. ( *People v. Robles* (1970) 2 Cal.3d 205, 214-215 ... [the right of defendant to testify]; *People v. Holmes* (1960) 54 Cal.2d 442 ... [right to trial by jury]; *People v. Gauze* (1975) 15 Cal.3d 709, 717 ... [right of competent defendant to refuse to enter insanity plea]; *People v. Frierson* (1985) 39 Cal.3d 803 ... [right of defendant to present a defense at the guilt phase, rather than the penalty phase of a special circumstance murder trial].)” (*People v. Brown, supra*, 179 Cal.App.3d 207, 214 -215.)

Here, after Montenegro expressed his desire to withdraw his plea, the court made no inquiry of defense counsel whether he was willing to present the motion on Montenegro’s behalf and it allowed Montenegro to present his motion to withdraw his plea in propria persona. In accord with *Brown* we conclude this was error. Further, although some evidence suggests Montenegro did not have a legitimate basis for withdrawing his plea, the court should have allowed defense counsel the opportunity to investigate Montenegro’s claim that his cognitive abilities were affected by a gunshot wound to the head as well as any other possible basis for Montenegro’s motion. Moreover, since the court did not, it is impossible to know whether defense counsel would have uncovered any information to support Montenegro’s motion if he had investigated this matter outside the presence of the court. Consequently, we reject respondent’s contention that the court’s error, if any, was harmless beyond a reasonable doubt.

Following independent review of the record, we find that with the exception of the issue discussed above, no other reasonably arguable factual or legal issues exist.

### **DISPOSITION**

The judgment is reversed. The matter is remanded to the trial court for the limited purpose of permitting defendant to make a motion to withdraw his pleas of nolo contendere in a manner consistent with the views expressed in *People v. Brown, supra*, 179 Cal.App.3d 207. In so doing the court should first determine whether defense counsel is able to continue representing Montenegro in light of the statements defense counsel made during the September 11, 2007, hearing. If the motion is denied, the judgment shall be reinstated.